APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED AND DATED MARCH 23, 2005, AMENDED MAY 6, 2005

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 02-2301

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

RICHARD A. REINHART,

Defendant-Appellant.

No. 03-4065

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

GRANT R. CALDWELL, DAVID L. GILLETTE, JAMES R. KRUSE, EDWARD W. MUIR, and KENT B. PETERSEN,

Defendants-Appellants.

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No. 03-4082

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

STEPHEN M. HARMSEN; KELLY C. HARMSEN,

Defendants-Appellants.

Nos. 03-4094 and 03-4183

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

WALLACE R. BENNETT,

Defendant-Appellant.

Before **SEYMOUR, HENRY**, and **LUCERO**, Circuit Judges.

HENRY, Circuit Judge.

This consolidated appeal involves the Plaintiff-Appellee Lloyd's of London's request for the court's recognition and enforcement of money judgments issued by the High Court of Justice, Queen's Bench Division, London, England, in its favor against each of the defendants. Lloyd's obtained money judgments in England against each of the six New Mexicans

(the "New Mexico Names") and the nine Utahns (the "Utah Names") (collectively, the "Names") in connection with underwriting obligations. Lloyd's then brought actions in the United States District Court for the Districts of New Mexico and Utah seeking recognition of these judgments as final and enforceable, entitled to full faith and credit in New Mexico and Utah, respectively. Each federal district court granted summary judgment in favor of Lloyd's. Of the Utah Names, one defendant reached a settlement with Lloyd's, leaving eight in this litigation. Five of the six New Mexico Names reached settlements with Lloyd's. We have consolidated these cases for disposition on appeal.

On appeal, the New Mexico Name raises several arguments. First, he argues that the English judgment deprived him of due process under New Mexico's Uniform Foreign Money-Judgment Recognition Act. Second, the New Mexico Name maintains that the English judgment stemmed from an action that is repugnant to New Mexico's public policy as the judgment: (a) violates New Mexico's securities laws; (b) is based on unconscionable contracts; (c) stems from adhesion contracts; (d) comprises unlawful cognovit notes, (e) is based on illusory contacts; and (f) violates the New Mexico Unfair Practices Act.

The Utah Names offer similar arguments. They contend that the district court cannot enforce the English judgments under Utah law, because the English system of jurisprudence is incompatible with American standards of due process, and that they did not receive an opportunity for a full and fair trial. The defendants also maintain that the English judgments conflict with Utah public policy. One Utah Name questions

whether diversity jurisdiction exists, and also challenges the enforcement of the English judgments as violative of Utah securities laws. Two Utah Names also contend that the district court's approval of the English post-judgment interest of eight percent per annum was incorrect.

We hold that the Utah and New Mexico Names received due process under the English system of jurisprudence and that, in the thirty-two days of hearing before English trial and appellate courts, they received an opportunity for a full and fair trial. As to the New Mexico Name, specifically, the English legal proceedings provided ample due process pursuant to New Mexico's Uniform Foreign Money-Judgment Recognition Act. We also hold that the Lloyd's judgments are not repugnant to New Mexico's public policy.

As to the Utah Names, we hold that the English proceedings satisfied Utah's due process requirements and the English judgments do not conflict with Utah's public policy. We also affirm the district court's denial of a motion for discovery and a motion to certify questions of law to the Utah Supreme Court. We hold that the parties in this case are diverse, and that enforcement of the English judgments does not violate Utah's securities laws. Finally, we reverse the district court's determination that Lloyd's English judgments should accrue interest at the English post-judgment interest rate.

Appendix A

I. BACKGROUND

Numerous courts have summarized the basic facts applicable to the underlying litigation, and these facts are not in dispute. *See Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Haynsworth v. The Corp.*, 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Soc'y of Lloyd's v. Webb*, 156 F. Supp. 2d 632 (N.D. Tex. 2001). We shall summarize the pertinent facts here, borrowing heavily from the detailed and well-reasoned *Webb* decision.

Lloyd's is not an insurer, but rather is the regulator of an insurance market located in London. Through Parliamentary Acts, specifically the Lloyd's Acts of 1871-1982, Parliament created Lloyd's and authorized it to regulate the English insurance market. Individual and corporate members of Lloyd's known as "Names" underwrite insurance. The New Mexico defendants and Utah defendants became Names in the Lloyd's market between the late 1970's and late 1980's.

The Names underwrite insurance by forming groups known as syndicates. Names are passive investors in the sophisticated scheme, but along with potential profits they may incur substantial personal and direct liability with respect to a portion of a syndicate's risk in the Lloyd's market. The liability of each Name is several rather than joint. As a condition of becoming members of Lloyd's, Names enter into agreements governing their membership in Lloyd's and their underwriting in the Lloyd's market. At issue here is the General Undertaking Agreement, which obligated the New Mexico and Utah Names, and all other Names, to comply

with the Parliamentary Acts under which Lloyd's was created and to submit any dispute arising out of their memberships or underwriting at Lloyd's to the English courts for resolution pursuant to English law. Each Name "irrevocably agree[d] that the courts of England [had] exclusive jurisdiction to settle any dispute" arising out of the underwriting of insurance business, and agreed that such "[p]roceedings brought in the English courts [were] conclusive and binding upon any party and may be enforced in the courts of any other jurisdiction." Case No. 02-2301, Aplts' App. vol. I, at 43 (General Undertaking Agreement).

By the early 1980's, which is about the time that Lloyd's solicited the Utah and New Mexico Names,

> Lloyds knew that it had problems with rising asbestos and toxic tort claims. The syndicates' reserves were inadequate to handle these rising claims and a committee known as the Asbestos Working Party was formed to gather information about the breadth of the problem. The problem was described as "the largest phenomenon that has ever hit the casualty insurance industry" and "the most significant legal and loss cost issue in the history of the industry." *Information about these claims was not published in the marketplace, was omitted from the audit instructions, and was not published in Lloyds financial statements for the year*. Although a letter was prepared that provided the necessary disclosures to the Names, it was merely placed in a file and never distributed to the intended Names. Simultaneously, Lloyds was

> campaigning in Parliament for passage of the Lloyds Act of 1982 which granted Lloyds and its governing body extraordinary bylaw-making powers and immunity. In exchange, Lloyds committed to providing better quality information to prospective Names. This promise was not fulfilled and Lloyds admitted to Parliament that it had not kept its promise. "The Council of Lloyds very much regrets that the undertaking to implement the recommendations . . . within 2 years of the Royal Assent has not been kept."

Webb, 156 F. Supp. 2d at 635 (emphasis supplied) (internal citations omitted).

According to former Name and lead plaintiff in the fraud action against Lloyd's, Sir Peter Jaffray, "[t]he only way they could keep going was to suppress the asbestos information, cook the books to ensure they were still showing profits and go after new investors." Case No. 02-2301, Aplts' App. vol. I, at 84 (Combined Mem. in Opp. to Summ. Judgment and in Support of Motion in Alt. for Discovery under Rule 56(c), Ex. 1 at 3 (*Lloyd's of London 1688 – ?*, TIME Feb. 21, 2002)). Further,

> [d]uring the five years that Lloyds failed to improve information disseminated to prospective Names, approximately 10,000 new Names had joined Lloyds, most of whom were U.S. investors.

Webb, 156 F. Supp. 2d at 635. The New Mexico and Utah Names contend that the Lloyd's representative emphasized

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Lloyd's long history of profitability, its exclusive and selective members, its program of annual audits, and that the risk of "unlimited liability" had been of little consequence in Lloyd's three-hundred-year history. *See* Case No. 02-2301, Aplts' App. vol. I, at 276- 320 (Mem. in Opp. to Summ. Judgment, exs. 3-8 (Affids. from Utah Names)).

> For the years of account 1988 through 1992, Lloyds suffered losses in excess of £8 billion (these were reported in 1991-1995). Once the Names' inquiries into the cause for the losses began, they concluded that Lloyds had been guilty of serious negligence and/or fraud. . . .
>
> The Names eventually filed suits in numerous cities across the United States claiming fraud against Lloyds in connection with their recruitment as investors, their placement on high-risk syndicates and their continuing to underwrite at Lloyds. In each of the cases Lloyds moved to dismiss based on a forum selection (the forum being in England) and choice of law (the law being English) clauses contained in the General Undertaking (i.e., a contract) that the Names had signed. In each of the cases filed, the courts of appeals enforced the forum selection and choice of law clauses.

Webb, 156 F. Supp. 2d at 635-36 (internal citations omitted).

Apparently, the New Mexico Name and several Utah Names were parties to one of these suits, *Richards v. Lloyd's*

of London, 135 F.3d 1289 (9th Cir. 1998). The *Richards* complaint indicates that all but Utah Names Stephen and Kelly Harmsen and were plaintiffs. *See* Case Nos. 03-4064, -4082, -4094, -4193, Aple's Supl.App. vol. I, doc. 3 at 43-49.

The *Richards* litigation addressed and rejected the Names' contention that "their disputes with Lloyd's should be litigated in the United States despite contract clauses binding the parties to proceed in England under English law." *Richards*, 135 F.3d at 1292. The Ninth Circuit held that to invalidate the choice of law provisions in the Lloyd's General Undertaking Agreement would result in an "unbounded" reach of the United States securities laws, and would hamper international commerce. *Id.* at 1293. Moreover, the court stated that "[t]he Names have recourse against [Lloyd's] for fraud, breach of fiduciary duty, or negligent misrepresentation." *Id.* at 1296.[1]

We reached a similar conclusion in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992). We rejected the plaintiff Name's contentions and held that

> English law does not preclude [the Name] from pursuing an action for fraud and we agree with

1. To the extent that Lloyds raises res judicata and collateral estoppel as affirmative defenses with respect to Mr. Bennett's arguments against the enforcement of the choices of law and forum, these matters are addressed in *Richards*, as discussed in § II(C)(4)(b), *infra*, and we hold such claims are precluded. Although Richards also discussed the policies of the anti-waiver provisions of the federal securities laws and referenced various state securities laws, *Richards* was limited to the choices of law and forum proceedings. To the extent the Names challenge the choices of law and forum under the state securities laws, these too are precluded. *See infra* § II(B)(2)(a).

> the Defendants that the Lloyd's Act does not grant statutory immunity for such claims. We have been shown nothing to suggest that an English court would not be fair, and in fact, our courts have long recognized that the courts of England are fair and neutral forums.

Id. (internal citations omitted). As such, trial proceeded in England. Following trial,

> the English courts found Lloyds guilty of negligence with respect to their Names and awarded the Names damages totaling £1 billion. Pursuant to the Lloyds' Act of 1982, however, the Lloyds' Council enacted a by-law that caused the funds awarded to the Names to be frozen. The Lloyds' Council placed Lloyds as trustee of the trust funds. The appellate court of England upheld Lloyds' right to freeze the funds and appoint Lloyds as trustee under the Lloyds Act of 1982.
>
> Because the losses were widely spread throughout the various syndicates, Lloyds developed a reorganization program in 1995-96 called Reconstruction and Renewal ("R & R"). This was a mandatory plan of reinsurance of all years of account prior to 1993 into one reinsurance company called Equitas Reinsurance Ltd. The available syndicate assets were £9.9 billion; yet the premium needed for the reinsurance (by December 31, 1995) was £14.7 billion. . . .

Webb, 156 F. Supp. 2d at 636 (internal citations omitted).

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In implementing the reorganization plan, Lloyd's required each Name to become a party to the Equitas reinsurance contract through an appointed, substituted agent, who signed the contract on behalf of the Name. The Equitas contract contained a "pay now, sue later" clause that precluded Names from asserting claims they might have against Lloyd's or others as a set-off or counterclaim to their Equitas Premium. The Equitas contract also contained a "conclusive evidence" clause, which provided that, in the absence of manifest error, Lloyd's determination of a Name's Equitas premium was conclusive:

> The Equitas premium was mandatory and each Name was required to pay Equitas the amount shown on his statement. If, however, the Name signed the settlement agreement included in the R & R package, the Name would be awarded a credit, which would result in a reduction in the amount he paid in.

Id.

The New Mexico and Utah Names were Names who neither signed the settlement agreement nor paid the assessment. When they did not pay, Lloyd's used its by-law powers from the Lloyd's Act of 1982 to appoint a Substitute Agent. This Substitute Agent was instructed to sign the Equitas contract on behalf of the Names who refused to sign the Equitas settlement. Next, Lloyd's began suing these non-settling Names. Lloyd's paid Equitas the premium allegedly owed by the non-settling Names and received an assignment for the premium in exchange. In late 1996, Lloyd's then sued

the New Mexico and Utah Names (and all remaining non-settling Names) for the amounts paid on their behalf.

Lloyd's served a writ of summons on each of the New Mexico and Utah Names, notifying them of the commencement of the English action against them. Each of the Names filed an Acknowledgment of Service of Writ of Summons through their solicitors of record. Through the filing of the Acknowledgment, each Name appeared in the English Court and notified Lloyd's of his or her intent to contest the claim. Although other Names actively defended in the English litigation, the New Mexico and Utah Names did not submit a notice of intention to defend, nor did they contest Lloyd's claims.

Those Names who did defend presented common objections and defenses. They alleged that Lloyd's lacked the regulatory authority to pursue certain aspects of the reorganization program, that they were entitled to rescind based on fraud in the inducement of their underwriting at Lloyd's, that they were entitled to litigate these claims of fraud, and that they were not bound by the Equitas reinsurance contract's "pay now, sue later" and "conclusive evidence" clauses. The English court found in favor of Lloyd's and entered judgment against each of the defendants. *See Webb*, 156 F. Supp. 2d at 636 (citing English cases).

Specifically, the court found that the "pay now, sue later" clause was enforceable and the Names could not assert a fraud claim as a set-off to the Equitas premium due. At the trial level, several hearings were held regarding the premium amounts and the trial court concluded that Lloyd's produced

sufficient documents justifying the premiums it claimed. Subsequently, each Name had the opportunity to present evidence that the calculation of the premium was "manifest error" pursuant to the Equitas contract. The court ruled against the Names with respect to the "manifest error" claims. *See Webb*, 156 F. Supp. 2d at 636.

The English court did find, however, that Lloyd's could be sued for fraud damages and that the Names were free to pursue separate fraud claims against Lloyd's. Approximately two-hundred non-settling Names brought a fraud case in England against Lloyd's titled *The Society of Lloyds v. Jaffray*. The Honorable Justice Cresswell of the High Court of Justice of England and Wales issued a 635-page decision in the *Jaffray* litigation in November 2000 dismissing sample Names' claims for deceit and fraudulent misrepresentation after a trial spanning nineteen weeks. *See* 2000 WL 1629463 (Q.B. 3 Nov. 3, 2000), *aff'd*, Ct.App. Civ. Div. 26 July 2002.

In October 1999, while the *Jaffray* case was pending, the court issued an order requiring any Names wishing to bring a fraud claim against Lloyd's to join the *Jaffray* action. Lloyd's sent a copy of a statement regarding the terms of the Order to every Name who had not accepted Lloyd's Reconstruction and Renewal settlement offer, including each of the New Mexico and Utah Names. *See* Case No. 03-4002, vol. V, doc. 95 at 3. Neither the Utah Names nor the New Mexico Name gave notice that they reserved the right to advance such allegations or otherwise become parties to the *Jaffray* litigation.

The English judgments against the Names were affirmed on appeal. All appeals from the entry of the English judgments have been exhausted. Following these rulings, the English Court entered individual judgments in favor of Lloyd's against each of the New Mexico and Utah Names.[2] On March 8, 2002 Lloyd's filed this action to collect on the judgments.

II. DISCUSSION

The Names raise two overarching arguments regarding the errors of the New Mexico and Utah district courts: (1) the courts erred when they determined that the English proceedings provided due process to the Names; and (2) the courts erred when they found that the English cause of action did not violate the public policy of either New Mexico or Utah. They also challenge the district courts' denial of other motions, and two Utah Names challenge the calculation of post-judgment interest.

At the outset, we note that the Names' two principal arguments have been raised unsuccessfully in various federal

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2. As of March 7, 2002 the U.S. dollar amounts for the principal portions of the judgments were, in the aggregate, as follows:

Utah Names:	$1,757,549.31
New Mexico Name:	$ 262,124.54

See Case Nos. 03-4065, -4082, -4094, -4183, Aple's Supl.App. vol. I, doc. 1, at 15-18 (Complaint filed Mar. 8, 2002); Case No. 02-2301, Aplts' App. vol. I, at 16 (Complaint filed Mar. 8, 2002).

and state courts, by defendants from several states.[3] Although we affirm the grant of summary judgment to Lloyd's for largely the same reasons as our sister circuits, our analyses of the defenses brought by the New Mexico and Utah Names are slightly different because of the defenses the Names assert. Furthermore, Utah, unlike the states whose law was applied by each court that has addressed the issue, has not adopted the Uniform Foreign Money-Judgment Recognition Act. Although the decisions of the other courts are highly persuasive, we must detour slightly as we apply Utah's comity

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3. *See e.g.*; *Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002) (affirming summary judgment for Lloyd's, under Uniform Foreign Country Money-Judgment Recognition Act, on grounds that English courts provide due process and enforcement of English judgment is not repugnant to Texas public policy); *Ashenden*, 233 F.3d 473 (7th Cir. 2000) (affirming summary judgment for Lloyd's under Illinois Uniform Foreign Money-Judgment Recognition Act, explaining that existence of due process in English courts is a "question . . . not open to doubt"); *Soc'y of Lloyd's v. Mullin*, 255 F. Supp. 2d 468, 476, 477 (E.D. Pa. 2003) (granting summary judgment for Lloyd's under Pennsylvania's Uniform Foreign Money Judgment Act, noting that "recognition of the English Judgment would not so offend Pennsylvania's notions of due process grounds," and that defendant's argument "fails to meet the high threshold for nonrecognition on public policy grounds"), *aff'd*, 96 Fed. Appx. 100 (3d Cir. May 5, 2004); *Soc'y of Lloyd's v. Grace*, 718 N.Y.S.2d 327, 328 (N.Y. App. Div. 2000) (affirming summary judgment for Lloyd's, explaining that "since the underlying English judgments are procedurally sound and do not violate any public policy of New York or the United States, they are entitled to comity"); *Soc'y of Lloyd's v. Baker*, 673 A.2d 1336, 1338 (Me.1996) (affirming summary judgment for Lloyd's and stating that the "application [of doctrine of comity] is a question of law that may be resolved by the court on a motion for a summary judgment") (citations omitted).

analysis to the assertions of the Utah Names. Although we empathize with the losses that the New Mexico Name and Utah Names have incurred, and we appreciate the sincerity of their arguments, and we find many of Lloyd's acts to be distinctly distasteful, the agreements the Names signed and the applicable law require that we must affirm the thorough and well-reasoned orders of the district courts, with one slight exception.

A. Standard of Review

We review the district court's grant or denial of summary judgment de novo, applying the standard applied by the district court pursuant to Federal Rule of Civil Procedure 56(c). *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1264 (10th Cir. 2004). "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law.' We view the evidence in a light most favorable to the non-moving party." *Id.* (quoting Fed. R. Civ. P. 56(c)).

B. New Mexico Law

The New Mexico Name contends that the district court erred when it failed to consider the procedures the English courts actually employed, and instead relied on the general proposition that the English courts are fair and neutral. The New Mexico Name also asserts that the enforcement of the English judgments violates New Mexico public policy. Applying New Mexico law, we hold that the district court appropriately assessed the English judicial system and no violation of due process or New Mexico public policy occurred.

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1. Due Process concerns were met.

The New Mexico Name claims the district court failed to appreciate how its enforcement of the English judgment deprived him of his due process rights. While the Full Faith and Credit Clause applies to the recognition and enforcement of judgments among sister states, it does not apply to judgments rendered in foreign countries. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 n.4 (1981) (Stevens, J., concurring in the judgment) ("The Full Faith and Credit Clause, of course, was inapplicable . . . because the law of a foreign nation, rather than of a sister State, was at issue. . . ."). The parties cite no federal statute applicable to the enforcement of foreign court money judgments in U.S. courts, nor any applicable treaty. Instead, the recognition and enforcement of foreign judgments are governed by state law. *See See Transport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 582 (2d Cir. 1993) ("We note that . . . the recognition of foreign judgments is governed by state law."); *see* Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. a (1987).

New Mexico has adopted the Uniform Foreign Money-Judgment Recognition Act. *See* N.M. STAT. ANN. §§ 39-4B-1 to 39-4B-9 (1978). Pursuant to the Act, "[a] foreign judgment is not conclusive" if

> the judgment was rendered under a *system* that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

and it "need not be recognized if:"

> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (2) the judgment was obtained by fraud;
>
> (3) the cause of action on which the judgment is based is repugnant to the public policy of this state. . . .

N.M. Stat. Ann. § 39-4B-5 (emphasis supplied).

The New Mexico Name contends that the New Mexico district court conflated the widely recognized general fairness of the English *system*, with this particular *judgment*, which, in his view, conflicts with his constitutional due process rights. Specifically, the New Mexico Name objects to (1) the English Courts' enforcement of the "pay-now, sue-later" clause, which prohibited him from raising certain defenses and counterclaims during the English action; (2) the "conclusive evidence" clause, because it renders the amount of the assessment determined by Lloyd's conclusive absent manifest error, and thereby fails to meet due process requirements; and (3) the fact that the cumulative effect of both these clauses is that the New Mexico Name could not receive a pre-deprivation hearing, could not obtain discovery as to the amount of Lloyd's claim, and could not challenge Lloyd's calculation of the amount due.

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As to whether the contested clauses, taken separately or together, amounted to a forfeit of the Name's due process rights, "[t]he question is not whether Lloyd's accorded due process to the names, but whether *the English courts* did. . . . Stated differently, the courts held that the names had waived their procedural rights in advance. . . ." *Ashenden*, 233 F.3d at 479 (emphasis supplied). Waiver of procedural rights in advance is clearly permitted, *see e.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) ("The due process rights to notice and hearing prior to a civil judgment are subject to waiver."). Moreover, given the New Mexico Name's "utter failure to participate in any stage of any of the English proceedings, 'we not only look with skepticism, but we flatly reject the due process complaint of a party who was given, and . . . waived, the opportunity of making the adequate presentation in the English Court.'" *Turner*, 303 F.3d at 331 n. 20 (quoting *British Midland Airways Ltd. v. Int'l Travel Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (internal quotation marks omitted)).

Although the New Mexico Name would prefer to have us focus on this particular *judgment*, rather than the English system, at this stage of these matters, we are not permitted to do so. *See* N.M. Stat. Ann. § 39-4B-5 (indicating that to determine "conclusive[ness]" of a "foreign judgment," a court examines the foreign country's "system" and whether it maintains "procedures compatible with the requirements of due process of law"). The procedures the English courts afford need not be identical to ours, they must only be compatible in that they do not offend the notion of basic fairness. *See Turner*, 303 F.3d at 331 ("the courts of England are fair and neutral forums") (footnoted citation omitted); *Hilton v. Guyot*, 159 U.S. 113, 205 (1895) ("[W]e are not prepared to hold that the fact that the

[foreign] procedure . . . differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment."); Uniform Foreign-Money Judgments Recognition Act § 4 cmt. ("[A] mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.");1 Restatement (Third) of Foreign Relations § 482 cmt. b (1987) ("A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered.").

And when we look to the basic fairness of the system, the answer is clear: "[O]ur courts have long recognized that the courts of England are fair and neutral forums." *Riley*, 969 F.2d at 958 (collecting cases); *see also Haynsworth*, 121 F.3d at 967 ("This is particularly so in the case of England, a forum that American courts repeatedly have recognized to be fair and impartial."). The Seventh Circuit similarly lauded the English system's regard for due process in its highly persuasive opinion involving nearly identical claims:

> Any suggestion that [the English] system of courts does not provide impartial tribunals or procedures compatible with the requirements of due process of law borders on the risible. [T]he courts of England are fair and neutral forums. The origins of our concept of due process of law are English. . . . and the English courts . . . are highly regarded for impartiality, professionalism, and scrupulous regard for procedural rights.

Ashenden, 233 F.3d at 476 (internal citations and quotations omitted).

We agree with the Seventh Circuit's reasoning and hold that given the structure of the English system, which is substantially similar to our own, the New Mexico Name's suggestion that the English court system does not provide tribunals compatible with due process is untenable. *See also Webb*, 156 F. Supp. 2d. at 640.

2. New Mexico's Public Policies were not violated.

The New Mexico Name also challenges the enforcement of the English judgments as a violation of New Mexico's public policy. First, he argues that Lloyd's violated the New Mexico Securities Act through its solicitation of unregistered securities and by making fraudulent representations. Second, he asserts that the Equitas contract is both procedurally and substantively unconscionable. Third, the New Mexico Name contends that the Equitas contract amounts to a contract of adhesion. Fourth, he asserts the Equitas contract is a "cognovit note," which both violates New Mexico public policy and New Mexico law. Fifth, he maintains that the Equitas contract is illusory. Finally, he contends the New Mexico Unfair Practices Act bars recognition of the Equitas contract.

Even if we assume the shaky premises of these assertions to be true (that Lloyd's made material misrepresentations and those misrepresentations would allow rescission under New Mexico law), we reject each of these claims for one overriding reason: English law as applied here does not violate New Mexico's public policy. As we iterate throughout the opinion, "[t]he view that every foreign forum's remedies must duplicate those available under American law would

render all forum selection clauses worthless. . . ." *Haynsworth*, 121 F.3d at 969; *see also Riley*, 969 F.2d at 958.

Furthermore, we reiterate that we must focus on the "cause of action" and the "claim for relief" underlying the English Judgment, not the differences in the bodies of law, because slight differences between England's and New Mexico's laws do not trigger the public policy exception. N.M. Stat. Ann § 39-4B-5(b)(3); *see Turner*, 303 F.3d at 332-33. Neither a breach of contract action nor a claim for money damages is repugnant to New Mexico public policy.

a. The State Agreement trumps the New Mexico Securities Act.

The New Mexico Name emphasizes that the New Mexico Securities Act embodies a public policy to protect New Mexico, and New Mexicans, and that the contract on which Lloyd's sued violated the state securities act. He relies heavily upon the declaration of Michael J. Vargon, Deputy Director of the Securities Division in the New Mexico Department of Regulation and Licensing. In an affidavit, Mr. Vargon states that after receiving various complaints from New Mexicans regarding Lloyd's solicitations to become Names, the Division concluded that the interest in the Names program was an investment contract and therefore a security, subject to the New Mexico Securities Act. Lloyd's failed to register these securities, and furthermore, "the information available to the Division strongly suggest[ed] fraud and misrepresentation in the inducement and continuing misrepresentation made to Names. . . ." Case No. 02-2301, Aplts' App. vol. I, at 325.

In response, Lloyd's points to the July 1996 State Agreement between Lloyd's and participating state securities regulators, including the Acting Director of the New Mexico Securities Division. The State Agreement recognizes that "certain State Securities Regulators have asserted the activities of Lloyd's . . . fall within the scope of their regulatory jurisdiction" and that "the activities of Lloyd's may have violated laws subject to their enforcement authority." *Id.* vol. II, at 747. The State Agreement also indicates that "Lloyd's denies it has violated any U.S. laws and denies it is subject to the jurisdiction of the States Securities Regulators with regard to the issues raised." *Id.*

The State Agreement appears to have been a necessary precursor to the enactment of the Reconstruction and Renewal plan. Under the State Agreement, Lloyd's promised to allocate credits to qualified State Names, in exchange for which the State Securities Regulators agreed to take steps necessary to terminate all proceedings and investigations pending against Lloyd's. In addition, the State Securities Regulators agreed not to "assist any private person or entity who seeks to pursue any action against Lloyd's. . . ." *Id.* vol. II, at 757. Because the Acting Director of the New Mexico Securities Division is a signatory to the State Agreement, and Mr. Vargon's declaration conflicts with the State Agreement, we reject the New Mexico Name's assertions based upon it. Furthermore, the New Mexico Name offers no explanation for this anomaly.

Moreover, as explained above, the New Mexico Name agreed in the General Undertaking Agreement that English law, not New Mexico law, would govern any disputes

between Lloyd's and him. The choice of law and choice of forum clause are not at issue in this litigation, and to enforce the New Mexico securities laws in this context would be inappropriate. *See Riley*, 969 F.2d at 958 (approving forum selection clause of General Undertaking Agreement); *Richards*, 135 F.3d at 1292 (holding the same as to the majority of the defendant Names in this case).

b. The English Judgments were not based on an unconscionable contract.

Next, the New Mexico Name invites us to examine the underlying contractual dispute through his contention that the Equitas contract is both procedurally and substantively unconscionable under New Mexico law. Procedural unconscionability is determined "by examining the circumstances surrounding the contract formation, including the particular party's ability to understand the terms of the contact and the relative bargaining power of the parties." *Guthmann v. LaVida Llena*, 709 P.2d 675, 679 (1985). "Factors to be considered include the use of sharp practices or high pressure tactics and the relative education, sophistication or wealth of the parties, as well as the relative scarcity of the subject matter of the contract." *Id.*

The New Mexico Name is a highly sophisticated investor who had to pass a "means" test and was required to post large sums of money as security for the unlimited liability that he knowingly undertook. Unquestionably Lloyd's presented no high pressure tactics: each Name was afforded the opportunity to read the General Undertaking Agreement in its entirety, and to fully understand the implications of its

terms. *See id.* at 680. The Equitas contract was not a new investment decision; it was the implementation of specific provisions to address the unlimited liability undertaken by all Names, pursuant to the General Undertaking Agreement's broad powers. There is no basis for concluding that there was any procedural unconscionability in the contracts on which the judgments were based.

The New Mexico Name's arguments regarding substantive unconscionability are equally unavailing. "Substantive unconscionability is concerned with contract terms that are illegal, contrary to public policy, or grossly unfair." *Id.* at 679. When terms are unreasonably favorable to one party a contract may be held to be substantively unconscionable. *Id.* at 680. "The terms are to be considered in the light of the general commercial background and the commercial needs of the particular trade or case." *Id.* (internal quotation marks omitted). Here, despite the apparently massive losses Lloyd's was absorbing, the terms of the General Undertaking Agreement were not so grossly unfair to the Names when the Agreement was formed. Approximately ninety-five percent of the Names accepted the subsequent Equitas contract, and forty-seven U.S. states signed the State Agreement to facilitate the Reconstruction and Renewal plan. Under these circumstances, we cannot say these were terms that "no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other." *Id.* (internal quotation marks omitted).

c. The English Judgments were not based on an adhesion contract.

The New Mexico Supreme Court's *Guthmann* holding also undergirds our rejection of the New Mexico Name's contention that the Equitas contract is an adhesion contract that violates New Mexico's public policy.

> Three elements must be satisfied before an adhesion contract may be found. First, the agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of the other. Second, the party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms. Finally, the contract must be offered to the weaker party on a take-it-or-leave-it basis, without opportunity for bargaining.

Id. at 678 (internal citations omitted). Here, the second and third elements are not met: the New Mexico Name was not in a weaker bargaining position nor did Lloyd's compel his investment.

d. The English Judgments were not based on a "cognovit note."

Next, the New Mexico Name contends that the General Undertaking Agreement and Equitas contract amount to a cognovit note, which is an ancient legal device "signed by a

defendant in an action actually commenced confessing the plaintiff's demand to be just, and empowering the plaintiff to sign judgment against him in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit." BLACK'S LAW DICTIONARY (8th ed. 2004); *see Overmyer*, 405 U.S. at 176. Thus the debtor agrees in advance to the entry of a judgment against him without notice or hearing. New Mexico public policy and New Mexico law prohibit cognovits and condemn judgments obtained through cognovits, enforcing them only where a defendant "voluntarily, knowingly and intelligently" waives his or her rights. As established above, the New Mexico Name did "voluntarily, knowingly and intelligently" waive his rights, in addition to receiving notice and being provided an opportunity to defend prior to the entry of the judgments. We have rejected the perceived lack of due process argument above, and consequently, this argument is foreclosed.

e. The English Judgments were not based on illusory contracts.

Next, the New Mexico Name maintains that Lloyd's judgments are repugnant to New Mexico's public policy because they are based on illusory contracts. Specifically, he contends that the General Undertaking Agreement and the Equitas contract lack consideration. The General Undertaking Agreement was part of the overall investment agreement between the Names and Lloyd's. The Agreement certainly placed obligations upon Lloyd's: when underwriting or investment profits were made, Lloyd's had to distribute to each Name his or her proper share. Likewise, the Equitas contract was supported by consideration: this reinsurance

contract helped Lloyd's survive and protected the Names from unlimited personal liability. The complaints about how Lloyd's may have met, or failed to meet, its obligations are another matter, which have also been considered by the English courts and in the *Jaffray* litigation.

f. The New Mexico Unfair Practices Act does not apply.

Finally, the New Mexico Name contends that the enforcement of the English judgment violates New Mexico's public policy because the contracts violated the New Mexico Unfair Practice Act, N.M. Stat. Ann. § 57-12-1 *et seq.* The Unfair Practice Act defines an unconscionable trade practice as any act or practice in connection with the sale for offering for sale of any goods or services that takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree or results in a gross disparity between the value received by a person and the price paid. *See id.* § 57-12-2(E). Neither party addresses whether the New Mexico Unfair Practice Act encompasses an action involving the interests of the New Mexico Name in underwriting insurance. *See, e.g., Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 977-78 (1986) ("[Connecticut Unfair Trade Practice Act] does not apply to deceptive practices in the purchase and sale of securities" because "Connecticut has long separated regulation of the purchase and sale of securities from the regulation of unfair trade practices in other industries."); *Simpson v. Grimes*, 849 So.2d 740, 745-746 (La. Ct. App. 2003) ("Although the plaintiffs allege unfair trade practices pursuant to [the Louisiana Unfair Trade Practices Act], this type of action under the . . . Unfair

Trade Practices Act has been found inapplicable to cases involving securities.").

To the extent the New Mexico Name asserts that Lloyd's took unreasonable advantage of him through its misrepresentation regarding asbestos claims, the English courts have considered and rejected such claims. As above, we cannot allow the New Mexico Name to relitigate the underlying cause of action under New Mexico law, despite his attempt to frame the action as violating New Mexico public policy.

C. Utah Law

Turning to the defenses of the Utah Names, we hold that these defenses fail for similar reasons. The Utah Names first assert that the district court improperly analyzed Utah's principles of comity when it determined that the process underlying the English judgments comported with constitutional norms of due process and of Utah public policy. Specifically, the Utah Names contend they did not have a full and fair trial in England, because they were bound by unlawful contracts, prohibited from asserting affirmative defenses, and prohibited from discovering or presenting evidence to refute the existence of the amount of liability. Utah Names Stephen and Kelly Harmsen raise the related argument that Lloyd's made material misrepresentations when it induced them to become Names in the Lloyd's market by failing to disclose information about potential asbestos and toxic tort liability. As a result, neither the forum selection clause nor the "pay-now, sue-later" clause should be held enforceable as matters of public policy.

The Utah Names also argue that they were entitled to discovery, and that the district court should have certified certain questions of law to the Utah Supreme Court. Utah Name Wallace Bennett contends that the district court lacked diversity jurisdiction, and that the enforcement of the judgment violates Utah's securities laws. Finally, Utah Names Stephen and Kelly Harmsen also challenge the district court's imposition of eight percent per annum post-judgment interest. With the exception of the post-judgment interest argument, we reject each of the Utah Names' contentions.

1. Principles of comity apply in this case.

Unlike New Mexico, Utah has not adopted the Uniform Foreign-Money Judgment Recognition Act. The Utah Supreme Court has indicated that a foreign country judgment can be enforced in Utah courts "under principles of comity." *Mori v. Mori*, 931 P.2d 854, 856 (Utah 1997) (citing *Hilton*, 159 U.S. 113). Under the Supreme Court's holding in *Hilton*, the principles of comity require recognition of a foreign judgment if

> (1) there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction,
>
> (2) conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant,
>
> (3) under a *system* of jurisprudence likely to secure an impartial administration of justice

> between the citizens of its own country and those of other countries,
>
> (4) there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or
>
> (5) no other special reason exists indicating why the comity of this nation should not allow it full effect.

Hilton, 159 U.S. at 202 (emphasis added).

According to the Utah Names, and in seeming contrast to *Hilton*, Utah's comity requires an analysis of the fairness of the English *judgment*, not merely of the English judicial *system*. The judgment here was based upon the Utah Names' signing the General Undertaking, which is a standardized contract between Lloyd's and the individual Names. According to the Utah Names, their assent to the General Undertaking resulted in their unknowing waiver of future due process rights in the Equitas contract.

Utah law provides that questions regarding the validity of a foreign judgment "should be tested by the law of the jurisdiction where the judgment was rendered." *Rocky Mtn. Claim Staking v. Frandsen*, 884 P.2d 1299, 1300-01 (Utah Ct.App.1994). We have no choice under Hilton and Rocky Mountain but to examine the entirety of the foreign judicial system, and not the particularity of individual judgments. *See also* 1 Restatement (Third) of Foreign Relations § 482

cmt. b (1987) ("A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered."). Like all the other circuits that have examined the question, we have already determined that the English judicial system is procedurally above reproach. *See, e.g. Ashenden*, 233 F.3d at 478 ("Even if the [defendants'] approach is valid–and we want to emphasize our belief that it is not–it cannot possibly avail the defendants here unless they are right that the approach requires subjecting the foreign proceeding to the specifics of the American doctrine of due process."); *see also Hilton*, 159 U.S. at 205 ("[W]e are not prepared to hold that the fact that the [foreign] procedure . . . differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.").

Here, for the sake of completeness, the district court looked to the underlying decisions rendered by the English courts that have considered and rejected each of the Utah Names' challenges to the "pay-now, sue-later" and "conclusive evidence" clauses. Case No. 02-2301, Aple's Supl.App. at 230 (Utah Dist. Ct. Order filed Nov. 12, 2002). The "pay-now, sue-later" provision left the Names free to pursue claims of fraud against Lloyd's in a separate proceeding, which many Names pursued unsuccessfully in the *Jaffray* litigation. *See id.* (citing *Soc'y of Lloyd's v. Wilkinson & Others*, at 17, 21 (Q.B. 23 Apr. 1997), *aff'd Soc'y of Lloyd's v. Lyon, Leighs & Wilkinson* (C.A. 31 July 1997) (Case Nos. 03-4065, -4082, -4094, -4183, Aple's Supl.App. vol. III, doc. 4, ex. J, at 682)).

Appendix A

The district court observed that the English courts held that the "conclusive evidence" clause was "not an unusual type of clause and [was] in principle appropriate to [the] contract." Case No. 02-2301, Aple's Supl.App. at 230 (quoting *Soc'y of Lloyd's v. Fraser & Others*, at 27 (C.A. 31 July 1998) (Case Nos. 03-4065, -4082, -4094, -4183, Aple's Supl.App. vol. III, doc. 4, ex. J, at 707)). Furthermore, the English courts "considered and rejected the argument that the Names should not be bound by the Equitas contract." Case No. 02-2301, Aple's Supl.App. at 230 (citing *Soc'y of Lloyd's v. Fitzgerald, Leigh and Others*, (Q.B. 20 Feb. 1997), *aff'd, Soc'y of Lloyd's v. Lyon, Leighs & Wilkinson* (C.A. 31 July 1997) (Case Nos. 03-4065, -4082, -4094, - 4183, Aple's Supp, App. vol. III, doc. 4, ex. J, at 622)).

We must reject the Utah Names' contentions that they were bound by unlawful contracts, that they were prohibited from asserting affirmative defenses, and that they were prohibited from discovering or presenting evidence to refute the existence of amount or liability. We therefore agree with the district court that the Utah Names were given a full and fair opportunity to litigate their claims before the English courts.

Similarly, we must reject the defenses mounted by the Harmsens. The English court considered and rejected the allegations involving material misrepresentations made by Lloyd's in connection with the solicitation of investment by potential Names.

2. The District Court did not Abuse its Discretion when it Denied Discovery.

The Utah Names sought discovery regarding (1) information about the basis for the amount of the alleged liability set forth in the English judgments; (2) information relating to Lloyd's appointment of the substitute agent and other details regarding the formation of the Equitas contract; and (3) information concerning Lloyd's contractual intent in entering into the General Undertaking Agreement.

Discovery rulings are generally within the sound discretion of the trial court, and we review only for abuse of discretion. *GWN Petroleum Corp. v. OK-Tex Oil & Gas, Inc.*, 998 F.2d 853, 858 (10th Cir. 1993). The discovery sought by the Utah Names was unnecessary to the district court's grant of summary judgment in favor of Lloyd's. To have granted the discovery would have resulted in a relitigation of the underlying General Undertaking Agreement and Equitas contract, both of which have been considered and litigated before the English courts. After reviewing the record, we find no abuse of discretion regarding the rulings on these motions.

3. Certification of Questions of State Law

The Utah Names suggest that (1) the district court erred when it refused to certify certain questions to the Utah Supreme Court and (2) we should sua sponte certify the questions of whether the English court met the "open courts provision" of the Utah Constitution. We reject each contention and hold that the district court did not abuse its discretion.

a. District court's denial of the motion was not an abuse of discretion.

We review the district court's decision not to certify questions of state law for abuse of discretion. *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988). Utah's open courts provision requires:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. I, § 11.

In general, open courts provisions in Utah serve two principal purposes: "First, they were intended to help establish an independent foundation for the judiciary as an institution. . . . Second, open courts or remedies clauses were intended to grant individuals rights to a judicial remedy. . . ." *Laney v. Fairview City*, 57 P.3d 1007, 1016 (Utah 2002). The Names attempt to invoke the open courts provisions in connection with their alleged waiver of their at the time-unknown due process rights.

While certification is appropriate "where the legal question at issue is novel and the applicable state law is unsettled," *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 667 (10th

Cir. 1990), it is never compelled. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). "[U]nder the diversity statutes the federal courts have the duty to decide questions of state law even if difficult or uncertain." *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) (citing *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943)). There is little caselaw suggesting that English law or any foreign law somehow abrogates the Utah Constitution. We have established there is no due process violation and that the Names waived their procedural rights in advance. *See Overmyer*, 405 U.S. at 185. The district court did not abuse its discretion when it rejected the Utah Names' motion to certify.

b. Sua sponte certification is unnecessary here.

We next consider whether we should certify this question to the Utah Supreme Court directly. Utah Rule of Appellate Procedure 41(a) states:

> The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.

Thus, there is a procedural mechanism for certification to the state court that we may consider using. However, we note that a necessary but not controlling component is the difficulty in determining the local law. *Cf. Lehman Bros.*,

416 U.S. at 390 ("[T]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit."). *Lehman Brothers* further noted that "[w]e do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Id.* at 390-91.

While no Utah court has rendered a decision on the precise issue in question, our analysis above establishes that there is no unusual difficulty in deciding the state law question or a likelihood that Lloyd's theory of liability would be adopted by the Utah courts. Thus, given the above conclusions, certification is unnecessary.

4. Outstanding Issues Presented by Utah Name Mr. Bennett

Mr. Bennett maintains there is not complete diversity between the parties, and he challenges the district court's enforcement of the English judgments as a violation of Utah securities law. He also raises defenses we have previously rejected. We address each defense briefly.

a. Diversity jurisdiction is present.

Mr. Bennett contends that Lloyd's is not a corporation, but is rather more like an association, which adopts the citizenship of each of its syndicate investment members. "Lloyd's and Equitas are merely agents for the syndicates, collecting cash calls from syndicate investor Names to pay off the liabilities arising from syndicate insurance policies." Bennett Rep. Br. at 5. Under this interpretation, "Lloyd's

attempt to claim federal diversity jurisdiction is a sham" and there is no federal subject matter jurisdiction. *Id.*

We must reject Mr. Bennett's assertions. Early on, Lloyd's may have been a form of an unincorporated association, but under the Lloyd's Act of 1871, the company was incorporated. Although we agree that Lloyd's is not a corporation within the traditional sense of the word, *see Ashenden v. Lloyd's of London*, 934 F. Supp. 992, 998-99 (N.D.Ill.1996), there is no challenge to or question regarding Lloyd's place of incorporation (it is duly incorporated under the laws of England). Similarly it maintains its principal place of business in London, England. These facts are unchallenged, and comprise the weightiest part of our inquiry. *See id.* (noting that the most important consideration is Supreme Court precedent "indicating that the citizenship of business entities must be determined by the simple fact of legal incorporation or the lack thereof, rather than the nature or attributes of the entity in question."). We thus hold that the jurisdiction is proper pursuant to 28 U.S.C. § 1332(a)(2). Equitas Reinsurance, Limited (the assignor of Lloyd's underlying claims against the Names) is also a duly incorporated English company formed under the laws of England, and Mr. Bennett's similar allegations against Equitas must also fail.

b. The Utah Securities Act offers Mr. Bennett no relief.

Mr. Bennett points to the Utah Securities Acts' "anti-waiver" provision as a bar to the enforcement of the English judgments. The anti-waiver provision declares that

"a condition, stipulation or provision binding a person acquiring a security to waive compliance with the chapter or rule hereunder is void." Utah Code Ann. § 61-22(9).

We note that the anti-waiver provisions of the Securities Acts of 1933 and 1934 are substantially the same as those found in the Utah statute. *See* 15 U.S.C. § 77n (1982) ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."); 15 U.S.C. § 78cc(a) (1982) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.").

The district court determined that our holding in *Riley* precluded enforcement of state as well as federal securities statutes. *See Riley*, 969 F.2d at 956. In *Riley*, the plaintiff claimed that Lloyd's engaged in the offer and sale of unregistered securities and made untrue statements of material fact and material omissions in connection with the sale of securities, violating both federal and Colorado's state securities laws. By enforcing the General Undertaking Agreement's forum selection clause requiring the application of English law, we did not deprive Mr. Riley of his day in court, but rather instructed Mr. Riley to "structure his case differently than if proceeding in federal district court." *Id.* at 958. Thus, we cannot accept Mr. Bennett's contentions and note that, as in the Ninth Circuit's decision in Richards (litigation to which Mr. Bennett was a party), "[w]e disagree with the dramatic assertion that the available English

remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law." *Richards*, 135 F.3d at 1296.

c. Mr. Bennett's remaining defenses are unavailing.

Mr. Bennett's remaining claims duplicate the Utah Names' arguments, or are without merit. For example, he challenges whether the General Undertaking Agreement can be binding upon him. He suggests that Lloyd's engaged in breaches of fiduciary duty, concealment and material misrepresentations because the General Undertaking does not warn a committing investor that he or she might later be made subject to an entirely different undertaking. Mr. Bennett also contends that the district court erred in its application of *Hilton*. For the reasons given above, we reject all of Mr. Bennett's defenses.

5. Post-Judgment Interest

Finally, Utah Names Stephen and Kelly Harmsen challenge the district court's application of an eight percent per annum post-judgment interest rate. They argue that once the federal district court enforced the judgments, the then-applicable interest rate of 1.16% was applicable.

We review de novo the district court's interpretation and application of 28 U.S.C. § 1961. *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1207 (10th Cir. 2004).

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . .

> Such interest shall be calculated from the date of the entry of the judgment at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.

28 U.S.C. § 1961(a). "This section shall not be construed to affect the interest on any judgment of any court not specified in this section." *Id.* § 1961(c)(4).

The district court reasoned that the English court is not a court specified by § 1961, and because the Names agreed that English law would govern the litigation, the post-judgment interest rate should be determined by English law, which would be 8%. Lloyd's argues that because the Names agreed to be bound by English law, English post-judgment interest applies. Furthermore, Lloyd's rejects the Harmsens' suggestion that the English judgments merge into the U.S. judgments.

We disagree with such reasoning. First, we acknowledge that parties may contract to, and agree upon, a post-judgment interest at a rate other than that specified in § 1961. *See Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 101 (2d Cir. 2004) ("We agree that parties may by contract set a post-judgment rate at which interest shall be payable."). However, agreeing to be bound by English law does not amount to agreeing to a particular post-judgment interest rate. The general rule under federal and Utah law is that "when a valid and final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause

of action on the judgment is substituted for it. In such a case, the original claim loses its character and identity and is merged in the judgment." *See Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 269 (2d Cir. 1989); *Yergensen v. Ford*, 16 Utah 2d 397, 402 P.2d 696, 697 (1965). "If parties want to override the general rule on merger and specify a post-judgment interest rate, they must express such intent through clear, unambiguous and unequivocal language." *Westinghouse Credit Corp.*, 371 F.3d at 102 (internal quotation omitted). Such language is not present in the agreements before us.

Second, the policies behind § 1961(a) support the application of the U.S. interest rate. "The purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the [judgment] and the payment by the defendant." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990) (quotations and alterations omitted). It preserves the value of the award as originally decided, affording neither party a benefit.

> [T]he universal application of Section 1961 to all types of claims makes for logical uniformity. Once a claim is reduced to judgment, the original claim is extinguished and merged into the judgment; and a new claim, called a judgment debt, arises. *See* RESTATEMENT OF JUDGMENTS § 47 (1942). A single rule should govern interest on any such debt, the nature of the original claim having become irrelevant under the doctrine of merger.

Kotsopoulos v. Asturia Shipping Co., 467 F.2d 91, 95 (2d Cir. 1972).

Thus, the federal rate reflects the economic conditions at the time the district court rendered its judgment, and, despite the disparity between the rates, we must apply § 1961(a), so interest accrues under the federal rate from the time the federal district court entered an order enforcing the judgment. *See Carte Blanche*, 888 F.2d at 268 (noting the provisions of § 1961(a) are mandatory).

We note that the application of § 1961 also fosters stability and certainty in international commercial transactions. Moreover, it provides "make whole" relief without overcompensating Lloyd's. Lloyd's derives various benefits from utilizing the federal court system to procure the execution and enforcement of its judgments. In return, Lloyd's is subject to the federal formula for determining an equitable post-judgment interest.

Finally, as to the district court's concerns with the limitations provided in § 1961(c)(4), we agree that the U.S. post-judgment interest rate applies to the district court's judgments, but not to the English court's judgments. The U.S. post-judgment rate should apply as of the date of the entry of the judgment in the U.S. district court.

Here, the eight percent figure appears to have been calculated in 1993, five years before the entry of the English judgment. *See* Case Nos. 03-4065, - 4082,-4064, -4183, Aple's Supl.App. vol. IV, at 995-96 (Section 17 of the Judgments Act of 1838 as amended by Statutory Instrument 1993 564(L.2) and provision of the Civil Procedure Rule 1998). The federal rate is calculated on a more current weekly basis, and better reflects the value of the award once entered in the United States.

Therefore, on remand, we instruct the Utah district court to clarify that the English post-judgment rate applies to the Harmsens' judgments from the entry of the English judgment (March 11, 1998) until the entry of the U.S. judgment enforcing the English judgment (November 2002) and that the federal rate, calculated pursuant to § 1961, applies thereafter.

III. CONCLUSION

There is no question that the New Mexico and Utah Names suffered substantial losses after investing in what had been, for three centuries, a well-regarded institution. There is also no question that Lloyd's was not forthcoming with all the information regarding its substantial financial losses. However, the English courts thoroughly and fairly considered and examined the plight of the Names before entering judgments against them. We must respect the ample process afforded by the English system of justice.

We affirm the New Mexico and Utah district courts' grants of summary judgment to Lloyd's. We reverse and remand with respect to the post-judgment interest as applied to the Harmsens' judgment, with instructions to recalculate the post-judgment interest in accordance with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED NOVEMBER 12, 2002

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Case No. 2:02-CV-204TC

THE SOCIETY OF LLOYD'S

Plaintiff,

vs.

WALLACE R. BENNETT, GRANT R. CALDWELL, CALVIN P. GADDIS, DAVID L. GILLETTE, STEPHEN M. HARMSEN, KELLY C. HARMSEN, JAMES R. KRUSE, EDWARD W. MUIR, and KENT B. PETERSEN,

Defendants.

ORDER

Plaintiff The Society of Lloyd's ("Lloyd's") filed this lawsuit to enforce money judgments it had obtained against the Defendants in England. Lloyd's has now filed the present Motion for Summary Judgment. For the reasons explained below, Lloyd's Motion for Summary Judgment is hereby GRANTED.

Appendix B

Various parties have also filed a number of motions, all of which are collateral to the Motion for Summary Judgment. The court's decision as to each of these motions is set forth in this Order.

BACKGROUND

1. *Factual Background*

Through Parliamentary Acts—the *Lloyd's Acts* 1871-1982—the United Kingdom Parliament has created and authorized Lloyd's to regulate the English insurance market. Lloyds promulgates and enforces regulations under the *Lloyd's Acts,* and exercises disciplinary authority over persons in the Lloyd's markets.

In Lloyd's, individual and corporate members known as "Names" underwrite insurance. The U.K. *Insurance Companies Act* permits Names to conduct insurance business only as long as they become and remain subject to Lloyd's regulatory jurisdiction.

As a condition of becoming members of Lloyd's, Names, including the Defendants, entered into agreements governing their membership in Lloyd's and underwriting in the Lloyd's market. Among these agreements and central to the issues in this lawsuit is the General Undertaking. In the General Undertaking, Defendants agreed, in part, (1) that they would comply with the provisions of the *Lloyd's Acts* 1871-1982 and any bylaws or regulations promulgated thereunder in connection with their membership of and underwriting at Lloyd's; and (2) that any dispute arising out of or relating to

their membership of and underwriting insurance business at Lloyd's would be resolved in English courts pursuant to English law. Pursuant to the *Lloyd's Acts*, Names could only participate in the Lloyd's market through an underwriting agent, who would contractually assume management responsibilities over Names' underwriting activities.[1]

Names underwrite insurance by forming groups known as "syndicates." Names' liability is several rather than joint. Each of the Defendants incurred liabilities with respect to insurance commitments that he or she undertook by assuming a portion of a syndicate's risk in the Lloyd's market. In order to close the syndicate at the end of each underwriting year of account, reinsurance is purchased to cover any outstanding liabilities as well as liabilities that have been incurred but not reported.

Underwriting in the Lloyd's market was historically a profitable venture. In the late 1980s and early 1990s, however, Names in the Lloyd's market incurred substantial losses. As a result of these losses, Names underwriting in those years were unable to purchase affordable reinsurance for their outstanding liabilities, thus facing open-ended liabilities. Many Names defaulted on their underwriting obligations as they came due, putting policyholders at risk of non-payment.

To address these issues, Lloyd's devised the reconstruction and renewal ("R&R") plan. The R& R plan provided reinsurance otherxise unavailable to each Name in

1. This underwriting agent is not to be confused with the substituted agent, discussed below, whom Lloyd's appointed to implement its reconstruction and renewal ("R&R") plan.

respect to his or her pre-1993 underwriting obligations through a newly formed company, Equitas Reinsurance Ltd. ("Equitas"). The R&R plan also provided an offer of settlement (the "Settlement Offer") to each Name with pre-1993 underwriting liabilities to end litigation and assist the Names in meeting their underwriting obligations. According to Lloyd's, the cost of reinsuring each Name's pre-1993 liabilities (the "Equitas Premium") was individually calculated and charged to the particular Name. Names who wished to resign their membership in Lloyd's would be able to do so upon payment of their Equitas Premium and other outstanding obligations. Names who did not accept the Settlement Offer did not receive credits to offset their Equitas premiums. The non-settling Names, however, could continue to litigate with Lloyd's and others who did business in the Lloyd's market. If the Settlement Offer was not accepted, a Name was still required to pay the full amount of his underwriting obligations, including the Equitas Premium.

Lloyd's, in implementing the R&R plan, required each Name to become a party to the Equitas reinsurance contract through an appointed, substituted agent. This substituted agent signed the contract on behalf of the Name.

The Equitas policy contained two key provisions, both at issue in this case. First, the Equitas reinsurance contract contained a "pay now, sue later" clause that precluded Names from asserting claims they might have had against Lloyd's as a set-off or counterclaim. The Equitas reinsurance contract also contained a "conclusive evidence" clause which provided that, "in the absence of manifest error," Lloyd's determination of a Name's Equitas premium was conclusive.

Appendix B

According to Lloyd's, less than five percent of all Names did not accept the Settlement Offer. A still smaller number, including the Defendants, refused to pay the Equitas Premium. The R&R plan became effective on September 3, 1996, and the Equitas Premium became due and payable on September 30, 1996. Equitas subsequently assigned the right to recover payment of the Equitas premium to Lloyd's.

Beginning in late 1996, Lloyd's brought separate actions in England against the Defendants and other Names who had not paid the Equitas Premium. In the English Actions, Lloyd's sought payment of each of the Defendants' respective Equitas Premiums plus unpaid interest and costs. The English Actions were commenced by filing a Writ of Summons in the English Court against each of the Defendants.

Lloyd's notified each of the Defendants of the commencement of the English Action against him or her by serving each Defendant through his or her agent, duly appointed to accept service, with a writ of summons. Each of the Defendants filed an Acknowledgment of Service of Writ of Summons through their solicitors of record, the firm of Epstein Grower and Michael Freeman. By filing the Acknowledgment, each Defendant appeared in the English Court and notified Lloyd's of his or her intent to contest the claim.

In lengthy hearings, the Names raised several defenses to entry of the judgments by the English Court. The defenses included the following, all of which were rejected: (1) that Lloyd's lacked the regulatory authority under the *Lloyd's Acts* 1871-1982 to mandate that all Names purchase reinsurance

coverage from Equitas; (2) that Names were entitled to rescind their membership of Lloyd's as a result of alleged fraud in the inducement of their membership of, or underwriting at, Lloyd's; (3) that Names were entitled to litigate claims of fraud in the inducement of their membership of, or underwriting at, Lloyd's as a defense or set-off to their obligation to pay the Equitas premium; and (4) that the Names were not bound by certain provisions of the Equitas reinsurance contract, namely the "pay now, sue later" clause and the "conclusive evidence" clause. *See Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs and Others*, [1997] (Demery Aff., Ex. J); *Society of Lloyd's v. Wilkinson & Ors.* (Q.B. 1997) (Demery Aff., Ex. J); *Society of Lloyd's v. Lyon; v. Leighs; v. Wilkinson,* (C.A. 1997) (Demery Aff., Ex. J) (affirming rulings of lower court); *Society of Lloyd's v. Fraser & Ors.* (C.A. 1998) (Demery Aff., Ex. K).

The English Court entered judgments in favor of Lloyd's against the Names on March 11, 1998. (*See* Demery Aff. Exs. A-I.) A three judge panel of the United Kingdom Court of Appeal heard argument on the application for leave to appeal by Names from June 15-19, 1998. Leave to appeal was denied on July 31, 1998. *See Society of Lloyd's v. Fraser & Ors.* (C.A. 1998) (Demery Aff., Ex. K). All appeals from the entry of the Judgments have been exhausted.

The Defendants have not satisfied their judgment debts. On March 8, 2002, the Society of Lloyd's filed a Complaint in this court to enforce the English judgments against the Defendants.

Appendix B

II. *Pending Motions*

The following substantive motions are pending before the court:

(1) Wallace Bennett's motion to declare a particular foreign writ to be subject to Utah substantive law and unenforceable;

(2) Lloyd's motion for summary judgment;

(3) Lloyd's motion to dismiss the counterclaim of Stephen and Kelly Harmsen;

(4) Mr. Bennett's motion for certification of state law questions;

(5) The Caldwell Defendants'[2] motion for certification; and

(6) The Caldwell Defendants' motion for discovery under Federal Rule of Civil Procedure 56(f).

Additionally, the following procedural motions are pending:

(7) Lloyd's motion to strike paragraph 6(g) of motion to declare a foreign writ unenforceable;

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2. The "Caldwell Defendants," who are represented by the same counsel, consist of Grant R. Caldwell, Calvin P. Gaddis, David L. Gillette, James R. Kruse, Edward W. Muir, and Kent B. Peterson.

(8) Lloyd's motion to strike affidavit of Wallace Bennett;

(9) The Caldwell Defendants' motion to strike declaration of Nicholas Demery;

(10) Lloyd's motion to strike portions of the affidavit of Stephen Harmsen; and

(11) Lloyd's motion to strike exhibits in support of the Caldwell Defendants' combined memorandum in opposition to motion for summary judgment and in support of motion in the alternative for discovery under Rule 56(f).

ANALYSIS

I. *Motions for Summary Judgment*

The Plaintiff moves for summary judgment. Defendant Wallace R. Bennett moves to declare a particular foreign country writ to be (1) subject to Utah substantive law and (2) unenforceable. Mr. Bennett's motion is, in essence, a motion for summary judgment and the court will treat it as such.

A. Legal Standard

Under Federal Rule of Civil Procedure 56, a court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The party moving for summary judgment bears the initial burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 323; *Adler*, 144 F.3d at 670-71. A movant "may make its prima facie demonstration simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Adler*, 144 F.3d at 671. In applying this standard, the court views the factual record and must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1402 (10th Cir. 1997).

Once the moving party has carried its initial burden, Rule 56(e) requires the nonmovant to "go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671 (quoting Fed. R. Civ. P. 56(e)). The specific and pertinent facts put forth by the nonmovant "must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). Mere allegations and references to the pleadings will not suffice. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Appendix B

B. Discussion

1. Can the English Judgments be Enforced under Principles of Comity?

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164 (1895).

The court's jurisdiction is based on diversity of citizenship. Utah law therefore applies concerning whether to enforce foreign judgments. *See Smith v. Toronto-Dominion Bank*, 166 F.3d 1222 (10th Cir. 1999), *available at* 1999 WL 38160, at **2 (applying Utah law when determining whether to recognize a Canadian judgment) (unpublished decision).

The Utah legislature, unlike many other states' legislatures, has not adopted the Uniform Foreign Money Judgments Recognition Act (the "Uniform Act"). *See Smith*, 1999 WL 38160, at **2. In *Mori v. Mori*, the Utah Supreme Court indicated that in Utah, "[a]bsent a treaty or statute, a foreign country judgment can be enforced only under principles of comity." 931 P.2d 854, 856 (Utah 1997) (citing

Hilton, 159 U.S. at 163-64). General principles of comity require a court to recognize a foreign judgment if

> there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment.

Smith, 1999 WL 38160, at **2 (quoting *Hilton*, 159 U.S. at 202). Determining whether to enforce another country's judgment is a matter of "judicial discretion." *Mori*, 931 P.2d at 856 (quoting *Pan Energy v. Martin*, 813 P.2d 1142, 1146 (Utah 1991)).

In an unreported decision, the Tenth Circuit has provided guidance regarding the proper analysis of comity under Utah law. *See Smith*, 1999 WL 38160, at **2. In *Smith*, a diversity action in which the Tenth Circuit applied Utah law, the court determined whether Utah courts would recognize a Canadian judgment. *Id.* at **2. No Utah court had yet "been called upon to recognize a Canadian Judgment." *Id.* The court, however, found it "reasonable to believe the Utah courts would [] recognize a Canadian judgment if that judgment satisfied the requirements outlined in *Hilton* and otherwise comported with Canadian law." *Id.* In making its finding,

the court relied upon "the Utah Supreme Court's statements in *Mori*, as well as the long history of other courts recognizing Canadian judgments under principles of comity." *Id.*

a. The English system of jurisprudence

In *Hilton*, the Supreme Court required that a foreign judgment sought to be enforced come from a country with "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries." *Hilton*, 159 U.S. at 202. As stated by the Ninth Circuit in a decision recognizing an English judgment, "[i]t has long been the law that unless a foreign country's judgments are the result of outrageous departures from our own motions of 'civilized jurisprudence,' comity should not be refused." *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (citing *Hilton*, 159 U.S. at 205).

There is little argument that the English courts are part of a judicial system that has procedures compatible with American standards of due process and impartial tribunals. *See Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992) ("We have been shown nothing to suggest that an English court would not be fair, and in fact, our courts have long recognized that the courts of England are fair and neutral forums.") As stated by Judge Posner for the Seventh Circuit in an opinion upholding the lower court's decision to enforce judgments against American Names, "[a]ny suggestion that [the English] system of courts 'does not provide impartial requirements of due process of law' borders on the risible." *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000).

b. Opportunity for a full and fair trial

The Defendants contend that they were not given an opportunity for a full and fair trial. According to the Defendants,[3] they were denied due process in a number of ways. Specifically, they contend that (1) they were unlawfully bound to unlawful contracts because an appointed substitute agent signed the Equitas contracts, (2) they could not assert affirmative defenses in the English proceedings, and (3) they could not engage in discovery or present evidence to challenge the existence or amount of liability. These alleged deficiencies all stem from the "pay now, sue later" and "conclusive evidence" provisions in the Equitas contract and the fact that an appointed agent signed the contract for the Defendants.

As a threshold matter, in cases in which the particular proceedings that are being challenged by the Defendants here were at issue, both the Seventh and Fifth Circuits have found that English courts provided adequate due process. *See Ashenden*, 233 F.3d at 476-77; *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 329-30 (5th Cir. 2002). These courts were deciding cases from jurisdictions which had passed the Uniform Foreign Money-Judgments Recognition Act. The courts' analyses, however, apply here, even though Utah has not adopted the Uniform Act.[4] In *Ashenden*, the court

3. Although the various Defendants filed separate memoranda and raised a number of independent arguments, the court will treat all Defendants and their arguments collectively, unless otherwise indicated.

4. Although not determinative, the court finds *Ashenden*, 233 F.3d at 482, and *Turner*, 303 F.3d at 329-30, to be persuasive. Like (Cont'd)

explained that the Uniform Act merely required that a foreign country's due process doctrines must be "compatible" with American doctrines. 233 F.3d at 477. This meant that foreign procedures must be "fundamentally fair" and not offend "basic fairness." *Id.* (quoting *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 687-88 (7th Cir. 1987), and citing *Hilton*, 159 U.S. at 202-03). The court emphasized that "[h]ow much process is due depends on the circumstances." *Ashenden*, 233 F.3d at 479. The "pay now, sue later" clause "enable[d] Equitas to be fully funded immediately," which "would work to the benefit of the names by giving them surer, earlier, and fuller reinsurance." *Id.* The conclusive-evidence clause "extinguishe[d]" claims by the Names. *Id.* at 480. The Seventh Circuit found that these clauses did not constitute procedural due process offenses. *See id.* at 479-80. The court also found that the English court's holding that Lloyd's could appoint agents to bind the Names without the Names' permission was not impermissibly unreasonable. *See id.* at 480-81.

In *Turner*, as in *Ashenden*, the Defendants raised many of the same arguments raised by the Defendants here,

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(Cont'd)

the Uniform Act, the operative and often cited language in *Hilton*, the Supreme Court decision cited with approval by the Utah Supreme Court in *Mori*, 931 P.2d at 856, emphasizes the soundness of a foreign country's "system of jurisprudence" and "system of laws." *Compare Smith*, 1999 WL 38160, at *2 (quoting *Hilton*, 159 U.S. at 202), *with Ashenden*, 233 F.3d at 476 (emphasizing the Illinois Uniform Act's reference to a foreign country's "system" of courts). Additionally, the Seventh and Fifth Circuits in *Ashenden*, 233 F.3d at 478-80, and *Turner*, 303 F.3d at 331 n.22, respectively, analyzed the underlying facts and the foreign proceedings sought to be enforced.

including a claim that the "pay now, sue later" clause and the "conclusive evidence" clause violated due process. *See Turner*, 303 F.3d at 327-28; *see also Soc'y of Lloyd's v. Webb*, 156 F. Supp. 2d at 639 (N.D. Tex. 2001), *aff'd sub nom, Soc'y of Lloyd's v. Turner*, 303 F.3d at 333. The Fifth Circuit rejected their arguments, noting that "[Defendants] Webb and Turner [had] provided no evidence that the English court proceedings [] were unfair." *Turner*, 303 F.3d at 331 n.22.

It is also important to recognize that the English courts have considered and rejected the Defendants' claims. In *Society of Lloyd's v. Wilkinson & Others*, at 17, 21 (Q.B. 1997) (Demery Aff., Ex. J), the court considered and rejected the Names' challenge of the "pay now, sue later" clause. This decision left the Names free to pursue claims of fraud against Lloyd's in a separate proceeding.[5] *See id.* at 21 (stating that the clause could "[i]n no sense . . . be described as excluding or restricting the remedy by way of damages for fraudulent misrepresentation"). In *Society of Lloyd's v. Fraser & Others*, at 27 (C.A. 1998) (Demery Aff., Ex. K), the court rejected the Names' challenge of the "conclusive evidence" clause. The court found that the provision was "not an unusual type of clause and [was] in principle appropriate to [the] contract." *Id.* The court also stated that "[n]o issue ha[d] been raised which [was] sufficient to justify going behind the figures produced under [the "conclusive evidence" clause] nor have

5. Many Names did bring fraud claims against Lloyd's in a separate action in England. *See Society of Lloyd's v. Jaffray*, 2000 WL 1629463 (Q.B. Nov. 2, 2000), *aff'd*, 2002 WL 1654876 (C.A. July 26, 2002). The English courts determined that the Names had not met their burden of proving that Lloyd's alleged misrepresentations were made fraudulently.

the Applicants succeeded in making out a case of manifest error in those figures." *Id.* at 28. Finally, the court in *The Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs and Others*, [1997], at 5-10, 31 (Demery Aff., Ex. J), considered and rejected the argument that the Names should not be bound by the Equitas contract.

In sum, Defendants were given a full and fair opportunity to litigate their claims in the English courts.

2. Public Policy Challenge

The Defendants claim that the English Judgments conflict with Utah public policy. Their arguments in support of this claim are basically the same as those supporting their due process claim. According to the Defendants, (1) the English Judgments violated public policy by binding the Utah Names to an unconscionable contract which was signed by an unauthorized agent; (2) the "pay now, sue later" provision in the Equitas contract violated public policy by not allowing the Names to raise affirmative defenses; and (3) the "conclusive evidence" clause violated public policy by preventing the Names from discovering or presenting evidence to refute the existence or amount of liability. In addition, Mr. Bennett contends that enforcing the Equitas contract would violate the anti-waiver provision of the Utah Uniform Securities Act.[6] *See* Utah Code Ann. § 61-1-22(9)

6. The effect of Utah Code Annotated section 61-1-22 in this case is one of the issues Mr. Bennett urges the court to certify to the Utah Supreme Court. (*See* Mem. Supp. Mot. for Certification of State Law Questions by Def. Wallace Bennett, at 10-12.)

(2000) (stating that "[a] condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void").

The district court in *Webb* rejected arguments similar to the Defendants' here. *See Webb*, 256 F. Supp. 2d at 643-44. Although its analysis was based on the Texas Uniform Act, the analysis is helpful here. The court distinguished between the cause of action on which the judgment is based and the judgment itself. The court stated that if *the cause of action* on which the judgment is based is repugnant to public policy, a court could refuse to recognize it. *See id.* at 643; *see also Turner*, 303 F.3d at 332. But if the judgment itself offends public policy, that fact, in and of itself, is not grounds for a court to refuse to recognize it. *Webb*, 156 F. Supp. 2d at 643. Additionally, the court in *Webb* noted that to refuse to enforce a foreign country judgment on public policy grounds, "[t]he level of contravention would have to be high," such that the foreign law was "inimical to good morals, natural justice, or the general interests of the citizen [sic] of this state." *Id.* at 644 (quoting *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 899 (N.D. Tex. 1980), and *Gutierrez v. Collins*, 583 S.W.2d 312, 322 (Tex. 1979)); *see also Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3rd Cir. 1971); Restatement (Third) of Foreign Relations § 482 cmt. f (1987) (stating that "[c]ourts will not recognize or enforce foreign judgments based on claims perceived to be contrary to fundamental notions of decency and justice").

As in *Webb*, Lloyd's cause of action in this case—for breach of contract—is not repugnant to Utah public policy. *See Webb*, 156 F. Supp. 2d at 643-44; *see also Turner*, 303

F.3d at 332. Additionally, the Defendants' claims of conflicting public policy, which focus primarily on the "pay now, sue later" and "convincing evidence" provisions in the Equitas contract and the appointment of a substitute agent, do not rise to levels that would require the court to not enforce the foreign judgment. *See Webb*, 156 F. Supp. 2d at 644; *Turner*, 303 F.3d at 331-32.

Finally, when the Names signed Lloyd's General Undertaking, they agreed that English law, not Utah law, would govern disputes arising between them and Lloyd's. *See Webb*, 156 F. Supp. 2d at 643 (rejecting public policy arguments because the Fifth Circuit had upheld the choice of law and choice of forum clause). The Tenth Circuit has upheld the choice of law and choice of forum clauses contained in the General Undertaking. *See Riley*, 969 F.2d at 958; *see also Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (following the court's "six sister circuits that have ruled to enforce the choice clauses"). Implicit in the Tenth Circuit's decision in *Riley* was an understanding that the resulting English Judgments could differ from decisions rendered in American courts. *See Riley*, 969 F.2d at 958 (stating that "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair").

Based on the above, the court concludes that the Defendants' arguments that enforcement of the Lloyd's judgments would violated Utah public policy are not persuasive.

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In addition, authority from both the Tenth Circuit and elsewhere also weighs against Mr. Bennett's claim that enforcing the English Judgments would conflict with Utah Code Annotated section 61-1-22. Section 61-1-22 provides that "[a] condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void." Utah Code Ann. § 61-1-22(9). To date, no reported decision appears to have discussed the scope of this anti-waiver provision. It follows that no decision has discussed whether Lloyd's General Undertaking, which calls for the application of English law, and the Lloyd's Act of 1982, which immunizes Lloyd's from many American securities laws, violate the public policy expressed in section 61-1-22. *See Richards*, 135 F.3d at 1296 (discussing the Lloyd's Act of 1982). There is no reason to believe, however, that Utah law would deal with this question any differently than the Ninth and Tenth Circuits have in recent years. *See id.*; *Riley*, 969 F.2d at 959.

In *Richards*, the Ninth Circuit determined that Lloyd's choice of law and choice of forum clauses did not "contravene a strong public policy embodied in federal and state securities laws." 135 F.3d at 1294-95. In that case, the Names relied upon *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985), to "argue that federal and state securities laws are of 'fundamental importance to American democratic capitalism.'" *Richards*, 135 F.3d at 1295. Relying on what the Ninth Circuit referred to as "dictum in a footnote regarding antitrust law," *id.*, the Names "claim[ed] that enforcement of the choice clauses [would] deprive them of important remedies provided by our securities laws." *Id.* The court, however, emphasized that the

Supreme Court had recognized "that parties to an international securities transaction may choose law other than that of the United States, . . . yet [had] never suggested that this affected the validity of a forum selection clause." *Id.* (discussing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508 (1974)).

The court in *Richards* recognized that "the Lloyd's Act immunizes Lloyd's from many actions possible under our securities laws." 135 F.3d at 1296. It explained, however, that "Lloyd's is not immune from the consequences of actions committed in bad faith, including fraud." *Id.*; *see also Riley*, 969 F.2d at 958 (stating that "English law does not preclude Riley from pursuing an action for fraud and we agree with the Defendants that the Lloyd's Act does not grant statutory immunity for such claims"). In part because such remedies were available, the court held that the anti-waiver provisions in the Securities Act of 1933 and the Securities Exchange Act of 1934 did not void the choice clauses in Lloyd's transaction with the Names. *See Richards*, 135 F.3d at 1296; *see also Riley*, 969 F.2d at 957 (giving effect to Lloyd's choice provisions and rejecting argument that the defendant was "being deprived of all substantive rights under the federal securities laws").

Mr. Bennett points outs that one California appellate court decision has declined to dismiss a claim against Lloyd's on the basis of the choice of forum and law clauses. (*See* Mem. Supp. Mot. to Declare Particular Foreign-Country Writ Unenforceable at 9); *West v. Lloyd's*, No. B095440, 1997 WL 1114662, at *8-9 (Cal. Ct. App. Oct. 23, 1997) (unpublished opinion). The court in *West* voided Lloyd's

choice clauses because the clauses "violat[ed] California's fundamental public policy against waivers of the protections afforded by its securities laws." *See* 1997 WL 1114662, at *1. This case, however, is not good law. The California appellate court in *West* relied on the Ninth Circuit's first opinion in *Richards v. Lloyd's*, 107 F.3d 1422 (9th Cir. 1997). *See West*, 1997 WL 1114662, at *6 n.8, *8 n.11. The first *Richards* decision was subsequently withdrawn by the Ninth Circuit sitting *en banc* in *Richards v. Lloyd's*, 135 F.3d at 1291.

As Lloyd's explains, in *Richards*, the plaintiffs specifically referenced state securities laws—including Utah's— in Appendix D to their Amended Complaint, and argued that these laws constituted a public policy against the choice of law and forum clauses. *See Richards*, 135 F.3d at 1295-96 (discussing the effect of federal and state securities laws on Lloyd's choice clauses). In this case, Mr. Bennett makes the same public policy argument that both the Ninth and Tenth Circuits rejected in *Richards* and *Riley*, respectively. *See Richards*, 135 F.3d at 1295-96; *Riley*, 969 F.2d at 957-58. The only apparent difference is that the provision Mr. Bennett relies upon, Utah Code Annotated section 61-1-22, has not been singled out and specifically discussed in either decision. Given the fact that the *Richards* and *Riley* decisions dealt with the same underlying transactions at issue here, Mr. Bennett's public policy argument should not defeat Lloyd's motion for summary judgment.

Based on the above, the court concludes that all the requirements set forth by the Court in *Hilton* have been met

and the Lloyd's judgments are entitled to recognition. Accordingly, Lloyd's Motion for Summary Judgment is GRANTED.

II. *Related Matters*

A. Lloyd's Motion to Dismiss the Harmsens' Counterclaim

The Harmsens' counterclaim alleges fraud in the inducement and negligent misrepresentation by Lloyd's. The Harmsens seek an accounting and a declaratory judgment. These claims concern the underlying transaction involving Lloyd's. Lloyd's argues that the forum selection and choice of law provisions signed by the Harmsens preclude litigation of their counterclaim in this court.

In opposition to Lloyd's motion to dismiss, the Harmsens make the following arguments: (1) the choice clauses should not apply here because Lloyd's availed itself in a United States court to enforce an English judgment; (2) Lloyd's is exempt from fraud claims in England, making any opportunity to bring such a claim in English courts illusory; and (3) the counterclaim is required as a mandatory counterclaim under Utah Rule of Civil Procedure 13(a). But the Harmsens provide no law in support of their arguments.

As discussed in detail above, the agreements between Lloyd's and each of the Defendants, including the Harmsens, contain forum selection and choice of law clauses that obligate the Defendants to litigate any claims they may have against Lloyd's in the courts of England under English law.

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Section 2.2 of the General Undertakings signed by Mr. and Mrs. Harmsen, respectively, states in part that the parties agreed "that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's." (*See* Demery Aff. Ex. E., Ex. F.) The Tenth Circuit in *Riley* found these provisions to be valid. *See* 969 F.2d at 958. In addition, at least seven other circuits have held these same clauses to be valid. *See Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998); *Richards*, 135 F.3d at 1294; *Haynsorth v. The Corporation, a/k/a Lloyd's of London*, 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993). Because no reported case law indicates that the court should disregard the choice clauses merely because Lloyd's is a plaintiff in this enforcement action, the court GRANTS Lloyd's motion to dismiss the Harmsens' counterclaim.

B. Motions for Certification of State Law Questions

Mr. Bennett and the Caldwell Defendants move to certify state law questions. Under Utah Rule of Appellate Procedure 41, a United States court, either on a motion or *sua sponte*, may certify certain questions of Utah law to the Utah Supreme Court. Utah R. App. P. 41(b) (2002).

Certification of legal questions to the state court is appropriate only where there is doubt about the application

of state law in a federal case. *See Houston v. Hill*, 482 U.S. 451, 471 (1987). The Tenth Circuit has stated that "[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) (quoting *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988)). Instead, certification should be invoked only in "exceptional cases" because the federal courts must "decide questions of state law whenever necessary to the rendition of a judgment." *Copier*, 138 F.3d at 838 (quoting *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943)).

The questions that the Defendants seek to certify are as follows:

> *1. Does Utah Substantive Law Apply in a Jurisdictional Diversity of Citizenship Case Seeking Enforcement of an English Judgment?*

Mr. Bennett seeks to certify to the Utah Supreme Court the question of what substantive law applies in this enforcement action. As discussed in detail above, the Utah Supreme Court has stated that, absent a treaty or statute, "principles of comity" determine whether foreign country judgments are enforceable in Utah. *See Mori*, 931 P.2d at 856. *Mori* favorably cited *Hilton*, 159 U.S. at 163-64, one of the Supreme Court's seminal comity decisions. Further, the Tenth Circuit, applying Utah law, recently employed principles of comity with respect to the *res judicata* effect of a Canadian judgment. *See Smith*, 1999 WL 38160, at **2. This decision applied Utah law with respect to whether the

foreign judgments should be given effect, *id.*, but noted that "questions regarding the validity of a foreign judgment 'should be tested by the law of the jurisdiction where the judgment was rendered.'" *Id.* at **2, n.2 (quoting *Rocky Mountain Claim Staking v. Frandsen*, 884 P.2d 1299, 1300-01 (Utah Ct. App. 1994)). These decisions provide clear answers to Mr. Bennett's proposed question for certification.

2. *Would Enforcement of Lloyd's English Judgments Against the Utah Names Violate Article I, Section 11 of the Constitution of Utah (the "Open Courts Provision")?*

Defendants contend that the applicability of the Utah Constitution's open courts provision in the context of enforcing a foreign country judgment presents a question of first impression in Utah. They also claim that this question is potentially dispositive in this case and that certification is therefore necessary. Although Defendants are correct that this issue has not yet been considered by a Utah court, the court believes that certification is not appropriate.

The Utah Constitution's open courts provision is similar to its due process provisions. Article I, section 11 states that

> [a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any

> tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const., art. I, § 11. In *Brown v. Wightman*, the Utah Supreme Court stated that Utah's open court's provision did not create new rights or remedies. 151 P. 366, 366-67 (1915). Instead, this provision "plac[ed] a limitation upon the Legislature to prevent that branch . . . from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy." *Id.* at 366-67; *see also Laney v. Fairview City*, No. 981729, 2002 WL 1822152, at *7-8 (Utah Aug. 9, 2002) (discussing *Brown*, 151 P. at 366-67); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 686 (Utah 1985) (declaring that a products liability statute of repose violated Article I, section 11 of the Utah Constitution).

This case does not involve a legislative limitation on the Names' ability to enforce their legal rights. As such, Article I, section 11 of the Utah Constitution is not relevant, much less potentially dispositive, in this case. *Cf. Berry*, 717 P.2d at 676 (discussing the open courts provision in the context of a legislative limitation on remedies). Additionally, the Defendants have not been barred from defending Lloyd's claims. Under *Mori*, the Defendants have been able to challenge the enforcement of the English Judgments under common law principles of comity. *See Mori*, 931 P.2d at 856.

Appendix B

3. Would Enforcement of Lloyd's English Judgments Violate Article I, Section 7 of the Utah Constitution, Utah's Due Process Clause?

The court has considered Defendants' due process challenges in this decision. The same analysis applies to the due process clause contained in Article I, Section 7 of the Utah Constitution.

4. Would Enforcement of Lloyd's English Judgments Violate Article I, Section 27 of the Utah Constitution?

Mr. Bennett moves to certify the question of whether Article I, section 27, the "fundamental rights" section, precludes enforcement of the English Judgments. Section 27 of Article I of the Utah Constitution states that "[f]requent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Utah Const., art. I, § 27.

As Lloyd's explains, its action is an ancillary proceeding to collect a money judgment. Mr. Bennett has not identified any fundamental rights or principles at issue, other than due process. This is not an appropriate basis for certification.

5. *Does Section 61-1-22(9) of the Utah Code Annotated Override the Forum Selection and Choice of Law Provisions in the General Undertaking?*

The court has dealt with this issue above. As discussed, no Utah case appears to have directly discussed whether section 61-1-22(9) of the Utah Code Annotated would void a choice of law or forum selection clause that precludes application of Utah securities laws. However, substantial case law from both the Tenth Circuit and elsewhere provide adequate guidance for the court on this question.

C. Motion for Discovery Under Federal Rule of Civil Procedure 56(f)

The Defendants move the court to grant the Utah Names the opportunity for discovery under Federal Rule of Civil Procedure 56(f). Under Federal Rule of Civil Procedure 56(f), a court may delay ruling on a motion for summary judgment or refuse summary judgment outright "where the non-moving party has not had the opportunity to discover information that is essential to his opposition." *Int'l Surplus Lines Ins. Co. v. Wyoming Coal Refining Sys., Inc.*, 52 F.3d 901, 905 (10th Cir. 1995); *see* Fed. R. Civ. P. 56(f). The party opposing a motion for summary judgment must provide affidavits indicating why that party cannot "present by affidavit facts essential to justify the party's opposition" to summary judgment. *Lewis v. City of Fort Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (quoting Fed. R. Civ. P. 56(f)); *Int'l Surplus Lines Ins. Co.*, 52 F.3d at 905.

The Defendants seek three types of discovery. First, the Defendants seek discovery about the basis and amount of the alleged liability on which the English judgments were based. The Defendants "expect to show that the amounts were completely arbitrary and therefore in violation of due process and public policy." Second, the Defendants seek discovery related to Lloyd's appointment of a substitute agent as well as the facts and circumstances surrounding the formation and execution of the Equitas contract. Third, the Utah Names seek discovery concerning Lloyd's contractual intent in entering into the General Undertaking.

The discovery sought by the Defendants goes to the validity of the underlying Equitas contracts and the appointment of a substituted agent to sign those contracts. The discovery sought by the Defendants is not relevant in light of the limited scope of this enforcement action. The Defendants' motion for discovery under Rule 56(f) is DENIED.

D. Motions to Strike

The parties' have filed various motions to strike materials submitted to the court. Those motions are DENIED AS MOOT.

IT IS SO ORDERED.

Appendix B

DATED this 12 day of November, 2002

BY THE COURT

s/ Tena Campbell
TENA CAMPBELL
United States District Judge

Supreme Court, U.S.
FILED
JUL 20 2005
OFFICE OF THE CLERK

No. 04-1731

IN THE

Supreme Court of the United States

WALLACE R. BENNETT,

Petitioner,

v.

THE SOCIETY OF LLOYD'S,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Tenth Circuit correctly determine that there is complete diversity of citizenship between the plaintiff in the district court (respondent here), The Society of Lloyd's ("Lloyd's"), an English corporation, and the defendants in the district court [including petitioner here, Mr. Bennett ("Bennett")], who are all individual residents of the State of Utah?

Did the Tenth Circuit correctly determine that an assignment of claims against Bennett from one English corporation, Equitas Reinsurance Limited ("Equitas"), to another English corporation, Lloyd's, was not a collusive assignment under 28 U.S.C. § 1359, for purposes of creating diversity of citizenship subject matter jurisdiction in the district court?

Did the Tenth Circuit, in this diversity action, correctly interpret Utah law in determining that Lloyd's English Judgment against Bennett is enforceable under principles of comity?

PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT

In addition to Lloyd's and Bennett, the parties in the Tenth Circuit included the following defendants-appellants: Richard A. Reinhart, Grant R. Caldwell, David L. Gillette, James R. Kruse, Edward W. Muir, Kent B. Petersen, Calvin P. Gaddis,[1] Stephen M. Harmsen and Kelly C. Harmsen. Lloyd's has no parent corporation and there is no publicly held company owning 10% or more of its stock.

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[1] During the pendency of the appeals in the Tenth Circuit, Lloyd's reached a settlement with Mr. Gaddis resulting in the dismissal of his appeal.

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